91-993 (2)

Supreme Court, U.S.
FILED
DEC 11 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

MICHAEL TOLOKAN, JR., Individually and d/b/a JOE AND MIKE'S SERVICE STATION,

Petitioners,

v.

MOBIL OIL CORPORATION,

Respondent.

On Writ of Certiorari In The United States Court of Appeals for the Second Circuit

---

APPENDIX

---

*RICHARD W. FARRELL
FARRELL & BARR
900 Ridgefield Drive
Suite 385
Raleigh, NC 27609
(919) 872-0300

Counsel for Petitioners

*(Counsel of Record)

TABLE OF CONTENTS

Page

APPENDIX A:

Opinion of the United States Court of Appeals for the Second Circuit (September 16, 1991) 2

APPENDIX B:

District Court Jury Verdict Form 5

APPENDIX C:

Robinson-Patman Act, 15 U.S.C. §13(a) and §13(b) 7

APPENDIX D:

Clayton Act §4, 15 U.S.C. §15 9

APPENDIX E:

F.R.C.P. Rule 50 10
F.R.C.P. Rule 59 11

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York on the 16th day of September, one thousand nine hundred and ninety-one.

PRESENT: Honorable J. Edward Lumbard,
Honorable Jon O. Newman,
Honorable George C. Pratt,
Circuit Judges.

MICHAEL TOLOKAN, JR., Individually and d/b/a JOE AND MIKE'S MOBIL SERVICE STATION and J & M, INC.,

Plaintiff-Appellant,

v. 91-7360

MOBIL OIL CORPORATION,

Defendant-Appellee.

ORDER

Appeal from the United States District Court of Connecticut (T. Emmet Clarie, Judge).

This cause came onto be heard on the transcript of record from the United States District Court for the District of Connecticut and was argued by counsel.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is AFFIRMED.

Michael Tolokan appeals from the January 25, 1991, judgment holding, following a jury trial, that defendant was not liable under the Robinson-Patman Act, 15 U.S.C. § 13, and its state law counterpart, Conn. Gen. Stat. §§ 35-45.

Tolokan has no cause of action under the statute because the jury found that he lacked the requisite antitrust injury. See *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981) (plaintiff must make some showing of actual antitrust injury to sue under the act). Tolokan contends that the jury's findings of no antitrust injury was tainted by the District Court's erroneous submission of the meeting competition defense to the jury. Tolokan argues that because the jury improperly considered and found, in special interrogatory number six, that Mobil's prices were set to meet competition, a finding that necessarily exonerated Mobil of a violation of the antitrust laws, the jury was constrained to find, in special interrogatory number five, that Tolokan had not been injured in a way that violated the antitrust laws.

We need not reach the question of whether the meeting competition defense was properly submitted. The District Judge clearly explained the logical order of the issues presented for resolution and instructed the jury to decide the issue of antitrust injury before going on to consider affirmative defenses: "If the Plaintiff proves by a preponderance of the evidence that he suffered antitrust injury, then you still need to consider whether Mobil has established an affirmative defense to the violation." There is no basis for believing that the jury's finding of no antitrust injury was unduly influenced by the submission of the meeting competition defense, and that finding

independently precludes recovery by Tolokan. The District Judge simply acted sensibly in securing from the jury a finding on the meeting competition defense, as an alternative ground for judgment.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

MICHAEL TOLOKAN, JR. :

vs. : Civil No.
N 82-106(TEC)

MOBIL OIL CORPORATION :

VERDICT FORM

1. Did the defendant, Mobil Oil Corporation charge the plaintiff, Michael Tolokan, a higher price for Mobil gasoline than it charged Aldin for Mobil gasoline? Yes ✓ No ___

2. Between 1981 and 1988, was Mr. Tolokan's station in competition with Aldin's station for purchasers of gasoline? Yes ✓ No ___

3. Were Mr. Tolokan and Aldin at the same functional level, that is, were they both retailers? Yes ✓ No ___

4. If your answers to questions 1, 2, and 3 are Yes, do you find that competition may have been harmed as a result of the different prices charged to Mr. Tolokan and to Aldin by Mobil? Yes ✓ No ___

5. Do you find that Mr. Tolokan was injured in a way that violates the antitrust laws by Aldin paying a lower price for gasoline? Yes___ No_✓_

6. Was the lower price offered to Aldin by Mobil to meet the equally low price offered by Mobil's competitors? Yes_✓_ No___

7. Was the lower price offered to Aldin by Mobil cost justified? Yes___ No_✓_

If your answer to questions 1-5 is yes and your answer to 6 and 7 is no, you should return your verdict for Mr. Tolokan, and then you should consider the next question. If your answer to any question from 1-5 is no, or your answer is yes to either 6 or 7 you should return your verdict for Mobil.

VERDICT:

___ Mr. Tolokan _✓_ Mobil

8. Do you find that Mr. Tolokan was damaged by Mobil? Yes___ No___

If your answer to question 8 is "yes", what is the amount of his damages? _____

/s/ Michael Daugherty

Dated: January 24, 1991

APPENDIX C

15 U.S.C. §13: Discrimination in price, services, or facilities -- Price; selection of customers

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in great quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce: and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce in selecting their own customers in bona fide transactions and no in restraint of trade: *And provided further*, That

nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section . . . : Provided however, That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

APPENDIX D

Clayton Act Sec. 4 (15 U.S.C. § 15): Treble Damages

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found, or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

APPENDIX E

Rule 50. Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict

(a) Motion for Directed Verdict: When Made; Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the party's motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with the party's motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

Rule 59. New Trials; Amendment of Judgments

(a) **Grounds.** A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) **Time for Motion.** A motion for a new trial shall be served not later than 10 days after the entry of judgment.

(c) **Time for Serving Affidavits.** When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) **On Initiative of Court.** Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served no later than 10 days after entry of the judgment.